PHILEOALLIED BANK (MALAYSIA) BHD

v.

DATO' TAJUDDIN HASHIM & ORS

HIGH COURT MALAYA, KUALA LUMPUR
STEVE SHIM J
[CIVIL SUIT NO: D5-22-1685-1990]
9 NOVEMBER 1998

BANKING: *Banks and banking business - Claim for repayment of loan - Letters of demand - Amount claimed in suit substantially higher than amounts claimed in letters of demand - Whether valid and proper demand - Whether prejudicial to 1st defendant - Whether fresh letter of demand should be issued - Whether claim dismissed*

CIVIL PROCEDURE: *Locus standi - Action for recovery of loan - Plaintiff bank takes over assets and liabilities of predecessor bank - Loan taken with predecessor bank - Whether plaintiff bank could institute action*

By virtue of a loan agreement dated 9 June 1984 ('the loan agreement'), the plaintiff bank granted a loan of RM3.1 million to the 1st defendant to develop a housing estate. Problems arose and the 1st defendant defaulted on the said loan. The plaintiff bank issued the 1st defendant a letter of demand dated 16 September 1986 for the sum of RM2,575,897.75 and when this was not paid, a subsequent letter of demand dated 21 October 1989 for the sum of RM4,236,028.05 was issued. This, too was not paid. Hence, the plaintiff bank filed this suit initially claiming for the sum of RM4,236,028.05 and thereafter for an increased sum of RM9,653,662.10 in an amended statement of claim.

Apparently, the 1st defendant's loan was taken with the predecessor bank before the plaintiff bank took over. As such, the 1st defendant claimed that the plaintiff bank had no *locus standi* to institute this action against him. Further, the plaintiff bank should have issued a fresh letter of demand against the 1st defendant consequent upon the Vesting Order made between the two said banks. Also, the letter of demand dated 16 September 1986 had not complied with s. 13.03 of the loan agreement as the requirement under s. 13.03 allowed for 7 days to secure payment whereas the said letter of demand provided for 14 days. Apart from this, the 1st defendant claimed that the amount of RM9,653 662.10 claimed in this instance was substantially higher than the amount claimed in the letters of demand that were served on the 1st defendant. Thus, it was claimed that the said letters of demand were improper and invalid. Against this, plaintiff relied on the authority of *United Asian Bank Bhd v. Dyalchand Sdn Bhd & 3 Ors* on the basis that there was no necessity to issue a new letter of demand.

Held:

[1] There was sufficient justification in excluding the *locus standi* issue because the statement of defence filed by the 1st defendant made no mention of this whatsoever nor could such a defence be implied therefrom. However, on the assumption that the 1st defendant could raise the issue of *locus standi*, there was no merit in such a defence in view of the clear and comprehensive terms of the Vesting Order that effectively transferred the assets and liabilities of the predecessor bank to the successor bank. The assets therein would include the authority or right to institute legal proceedings to recover loans and/or advances granted under the loan agreement.

[2] Vesting Order can be likened to the situation of the predecessor bank leaving its shell and the successor bank filling in the space left vacant by the predecessor bank (*Leong Moh Sawmill Co Sdn Bhd (in liquidation) v. Standard Chartered Bank & 2 Ors*). As such, the proposition that there was a need or an obligation on the part of the plaintiff bank to issue a fresh letter of demand against the 1st defendant consequent upon the Vesting Order was devoid of merit or substance.

[3] The non-compliance of the letter of demand dated 16 September 1986 with s. 13.03 of the loan agreement was a mere technical breach and quite insignificant as it would not have caused any prejudice to the 1st defendant. On the contrary, it could only benefit him.

[4] The case of *United Asian Bank Berhad v. Dyalchand Sdn Bhd & 3 Ors* was distinguished as it concerned a situation where after the issuance and service of the notice of demand, certain payments were effected by the defendant thereby reducing the amount due from him to the plaintiff. Thus, the notice of demand would not have been adversely affected by the subsequent reduction in the amount claimed by the plaintiff against the defendant probably because there was no prejudice involved.

[4a] However, a substantial increase in the amount claimed after the issuance and service of a notice of demand, would be most prejudicial. In the circumstances, it was only fair and proper to expect the plaintiff bank to issue and serve a fresh letter of demand setting out the increased amount claimed. The two letters of demand dated 16 September 1986 and 21 October 1989 sent by the plaintiff bank to the 1st defendant did not constitute a valid and proper demand.

[Plaintiff's claims dismissed; costs to be taxed unless otherwise agreed.]

Case(s) referred to:

Leong Moh Sawmill Co Sdn Bhd (in liquidation) v. Standard Chartered Bank & 2 Ors [1996] 3 AMR 2814 ***(refd)***

United Asian Bank Bhd v. Dyalchand Sdn Bhd & 3 Ors [1994] 1 AMR 624 ***(dist)***

For the plaintiff - Theyakaraja (CY Leong & Geetha with him); M/s Rashid & Lee

For the defendants - K Balaguru (S Valen & Gayanthi with him); M/s Francis Nathar Nora Antoine & Co

Reported by Usha Thiagarajah

JUDGMENT

Steve Shim J:

This is an action for recovery of monies. By virtue of a loan agreement dated 9 June 1984, the plaintiff granted credit facility of RM3.1 million to the 1st defendant for the purpose of enabling him to develop a housing estate. However, problems arose and soon the 1st defendant defaulted on the loan.

In consequence, the plaintiff, through its solicitors, issued the 1st defendant an alleged letter of demand dated 16 September 1986 for the sum of RM2,575,897.75 as at 15 September 1986. The 1st defendant did not pay. The plaintiff then, through its solicitors, issued another alleged letter of demand, this time for the sum of RM4,236,028.05 as at 31 August 1989. Again the 1st defendant did not pay. Thereafter, the plaintiff filed this suit against the 1st defendant initially claiming for the sum of RM4,236,028.05 but this was increased to RM9,653,662.10 under the re-amendment to statement of claim as amended.

The statement of defence filed by the 1st defendant contains essentially of denials. However, the 1st defendant through his counsel has raised two main issues, namely, (1) that the plaintiff has no *locus standi* to institute this action against the 1st defendant, and (2) that the alleged letters of demand issued by the plaintiff against the 1st defendant were improper and invalid. It is the plaintiff's contention that these two main issues should be rejected by the court on the ground that they were not pleaded in the statement of defence which, according to counsel, consists of bare denials.

In my view, I think there is sufficient justification in excluding the *locus standi* issue because quite obviously the statement of defence filed by the 1st defendant makes no mention of this whatsoever nor can such a defence be implied therefrom. However, as regards the other issue relating to the alleged letters of demand, such a defence can reasonably be drawn or implied from para. 9 therein which states:

Defendant Pertama juga menafikan ada menerima surat tuntutan yang disebut oleh Plaintif di perenggan sepuluh Penyata Tuntutan.

Although this appears to be a general denial, it does throw open the need or the obligation on the part of the plaintiff to pursue its allegation under para 10 of the re-Amendment to the statement of claim as amended. It would therefore be a denial of justice to exclude consideration of this defence.

Now, on the assumption that the 1st defendant could, for any reason, raise the issue of *locus standi*, I am nevertheless of the view that there is no merit in such a defence in view of the clear and comprehensive terms of the vesting order dated 5 December 1994. In this connection, I need refer to cll. (A), (B) and (C)(ix) and (xi) therein which states:

(A) the Assets of the Co-operative Central Bank Limited (also known as Bank Pusat Kerjasama Berhad) (hereinafter referred to as 'the Transferor') which comprises only Loans and Advances and Accrued Interest thereon; Securities; Investments; Deposits; Cash on Hand; Agreements; Physical Assets; Land; Sundry Debtors and Records and which are defined as follows:

'Loans and Advances':

means all loans, advances, leases, hire purchase transactions, block discounting and other credit facilities and overdraft facilities granted by the transferor to its customers as of the Transfer Date (hereinafter defined) and includes all obligations of borrowers and other customers of the Transferor with respect to the foregoing: ...

as set out in the Sale & Purchase Agreement dated the 10th day of October 1994 (hereinafter referred to as 'the said Sale & Purchase Agreement') entered into between the Transferor and Allied Bank (Malaysia) Bhd (hereinafter referred to as 'the Transferee') be transferred and vested in the Transferee to give effect to the terms and conditions set out in the said Sale & Purchase Agreement ...

(B) the transfer and the vesting of the Assets and Liabilities referred to in para. (A) shall take effect from the 1st day of January 1995 (hereinafter referred to as 'the Transfer Date')

(C) in addition and not in de rogation to paragraphs (A) and (B) above and with a view to facilitate and give effect to the said Sale & Purchase Agreement, it is hereby further ordered pursuant to Regulation 9C of the Essential (Protection of Depositors) (Amendment) Regulations 1994 that: ...

(ix) in respect of any right or liability of the Transferor transferred to the Transferee pursuant to this Order, the Transferee shall have the same

rights, powers and remedies (and in particular the same rights and powers as to the taking or resisting legal proceedings on making or resisting applications to any authority) for ascertaining, protecting or enforcing that right or resisting that liability as if it had at all times been a right or liability of the Transferee, including those rights or liabilities in respect of any legal proceedings or applications to any authority pending immediately before the Transfer Date by or against the Transferor;

(xi) all legal, arbitration, tribunal and other proceedings in relation to the Assets and liabilities as defined in paragraph (A) above, which are pending and in or to which the Transferor is a party may be constrained as if the Transferer had been a party thereto instead of the Transferor;

...

In my view, when the above clauses are read in the light of the other terms and conditions of the vesting order, it seems clear that the predecessor bank has been effectively substituted by the successor bank. There is in effect a transmission of the assets and liabilities from the predecessor bank to the successor bank. The assets stated therein would obviously include the authority or right to institute legal proceedings to recover loans and/or advances granted under the loan agreement dated 9 June 1984: (see *Leong Moh Sawmill Co Sdn Bhd (in liquidation) v. Standard Chartered Bank & 2 Or*s [1996] 3 AMR 2814). For the reasons given, I am therefore unable to accept the 1st defendant's contention that the plaintiff has no *locus standi* to commence this suit. It has no merit whatsoever.

The second main issue raised by counsel for the 1st defendant consists of two propositions, namely, (1) that the plaintiff should have issued a fresh letter of demand after the making of the vesting order instead of relying on the demand sent by the Co-operative Central Bank Ltd (CCB) and (2) that the alleged letters of demand relied upon by the plaintiff did not comply with the relevant provisions of the loan agreement entered into between CCB and the 1st defendant.

Let me quickly say that in the absence of any supporting authority, I am not convinced that the first proposition holds much water. In my view, the case of *Leong Moh Sawmill Co Sdn Bhd (supra)* seems to provide an answer against it. Therein, Siti Norma, JCA, had said *inter alia*:

> Vesting Order can be likened to the situation of the predecessor Bank leaving its shell and the successor Bank filling in the space left vacant by the predecessor Bank.

That general but appropriate observation by Her Ladyship seems to fit the present case having regard to the facts and circumstances. In the premises, the proposition that there was a need or an obligation on the part of the plaintiff to issue a fresh letter of demand against the 1st defendant consequent upon the vesting order is devoid of merit or substance and I ought to reject it.

The second proposition has, I think, more bite. Here, counsel for the 1st defendant has submitted that the alleged letters of demand dated 16 September 1986 and 21 October 1989 did not comply with the provisions of ss. 9.01 and 10.01 of the loan agreement and as such, there was no proper and lawful demand effected at the material time. According to him, the notices under the two sections have to be effected before the plaintiff could commence legal action against the 1st defendant. However, counsel for the plaintiff, has contended, in rebuttal, that the alleged letters of demand were issued not pursuant to ss. 9.01 and 10.01 but pursuant to s. 13.03 which sought the repayment of the loan granted to the 1st defendant. Section 13.03 stipulates:

> **Demand**
>
> Any demand for payment of the monies intended to be hereby secured may be made by a notice in writing requiring payment within seven (7) days from the date of demand and may be signed on behalf of the Bank by the General Manager, Assistant Manager or Accountant or any other officer of the Bank or by my solicitor or firm of solicitors purporting to act for the Bank and such notice shall be deemed to have been sufficiently served on SYARIKAT RIBBONS SDN BHD and the Borrower by sending the same by registered post addressed to SYARIKAT RIBBONS SDN BHD and the Borrower at the addresses as set out in sections 14.01.

According to counsel, since there was a deeming provision in s. 13.03 and since the alleged letter of demand dated 16 September 1986 was sent to the address of the 1st defendant provided under s. 14.01 of the loan agreement, there was therefore a proper demand made. In this connection, he has also submitted that the alleged letter of demand was in fact a proper demand relying essentially on-the last paragraph thereof which states:

> **Harap Ambil Perhatian**, kegagalan atau keengganan tuan menunaikan kehendak Notis ini dalam tempohan masa yang ditetapkan di atas, tindakan undang-undang akan diambil terhadap tuan untuk **mendapatkan kembali** kesemua jumlah tunggakan pinjaman dan faedahnya serta kos perbelanjaan tanpa rujukan selanjutnya.

Herein, counsel has underscored the words "mendapatkan kembali" to mean that a demand had been effected by the plaintiff on the 1st defendant at the material time. I am not sure those words should be read in isolation. In my view, the whole paragraph simply states that if the 1st defendant fails or

refuses to pay the sum under this notice within the time stated above, legal action will be taken against him to recover back the whole loan together with interests and costs without further reference. The reference to the payment "dalam tempohan masa yang ditetapkan di atas" seems to relate to the period of time specified in the second last paragraph which reads:

> Kami seterusnya diberitahu bahawa tuan telah gagal menyempurnakan bayaran pinjaman tersebut sebagaimana yang ditetapkan dulu. Sehingga 15hb September 1986, jumlah tunggakan adalah sebanyak $2,575,397.75 dan juga kos Notis ini sebanyak $30.00 kepada kami sebagai peguam mereka dalam tempoh masa empat belas (14) Hari dan tarikh penerimaan Notis ini.

If that be the case, then the period of time intended would seem to be 14 days. Here, counsel for the 1st defendant has drawn attention to that part of section 13.03 which states:

> Any demand for payment of the monies intended to be hereby secured may be made by notice in writing **requiring payment within seven (7) days from the date of demand**.

Counsel maintains that the requirement underscored above had not been complied with in the alleged letter of demand dated 16 September 1986 apparently on the ground that whereas the requirement under s. 13.03 allowed for seven days, the alleged demand had provided for 14 days. In my view, this could be regarded as a mere technical breach and quite insignificant as it would not have caused any prejudice to the 1st defendant. On the contrary, it could only benefit him. However, there is one significant factor to be noted. It is this. The alleged letter of demand dated 16 September 1986 is seeking for the payment of an amount totalling $2,575,897.75 within 14 days upon receipt of the notice. And this sum is of course substantially less than the amount of RM9,653,662.10 claimed under the re-amendment to statement of claim as amended dated 17 March 1997. Here, counsel for the plaintiff has relied on the authority of *United Asian Bank Bhd v. Dyalchand Sdn Bhd & 3 Ors* [1994] 1 AMR 624, in particular, that part of the judgment of Zakaria Yatim, J (as he then was) which states under holding (3):

> A letter or notice of demand is not affected or obviated by partial payment and there is no necessity for a new notice to be issued every time a payment is made as the cause of action commence from the time of service of the letter of demand until trial, notwithstanding that some monies are paid by the guarantors to be plaintiff.

It seems clear that the observation made by the learned judge concerns a situation where after the issuance and service of the notice of demand, certain payments were effected by the defendant thereby reducing the amount due from him to the plaintiff. Thus, the notice of demand would not have been

adversely affected by the subsequent reduction in the amount claimed by the plaintiff against the defendant. It might be because there was no prejudice involved. In any event, it would not have been intended to cover a situation where the amount claimed by the plaintiff against the defendant has substantially increased after the issuance and service of the notice of demand because that would have been most prejudicial to the defendant. In the instant case, the plaintiff is claiming a total sum of RM9,653,662.10 as at 24 February 1997 together with interest at the rate of 12% p.a. on monthly rest basis from 25 February 1997 till date of full realisation as reflected in the re-amendment to statement of claim as amended whereas the alleged letter of demand dated 16 September 1986 relates to an amount of $2,575,897.75 including cost of $30.00. Because of the prejudicial effect which such increased claim would or could reasonably have caused the 1st defendant, it is only fair and proper to expect the plaintiff to issue and serve a fresh letter or notice of demand setting out the increased amount claimed. This proposition seems to find acceptance in the written submission of counsel for the plaintiff, the relevant part of which reads:

> It is submitted by the Plaintiff that the basis for which the second letter of demand sent on 21st day of October 1989 was that the Plaintiff has changed his solicitors that time from Messrs Hoe Ahmad & Zaiki to Messrs Rashid & Lee and because of the change of solicitors and also the difference in the amount outstanding, it is then appropriate for the newly appointed solicitors to send a fresh letter of demand against the First Defendant.

From the passage cited, it would seem that one of the reasons for issuing the second letter of demand dated 21 October 1989 was because there was an increase in the amount claimed by the plaintiff against the defendant. In fact, the second letter of demand sought for the payment of $4,236,023.05 with interest as well as a further sum of $70.00 for notice charges. In the circumstances, where the plaintiff had further increased its claim to RM9,653,662.10 against the defendant as at 24 February 1997 (as reflected in the re-amendment to statement of claim as amended), it would have been reasonable to expect it to issue a fresh notice of demand accordingly but it did not. In this case, there was a substantial increase claimed by the plaintiff.

For the reasons stated, I must hold that the 2 letters of demand dated 16 September 1986 and 21 October 1989 respectively, sent by the plaintiff to the 1st defendant, could not be said to constitute a valid and proper demand. In the circumstances, there could be no basis to support the plaintiff's claims. Accordingly, I will dismiss them with costs to be taxed unless otherwise agreed.